

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION**

TIMOTHY C. HAITHCOX,

Petitioner,

vs.

JIM SALMONSEN; ATTORNEY
GENERAL OF THE STATE OF
MONTANA,

Respondents.

CV 21-46-H-BMM-JTJ

**ORDER ADOPTING MAGISTRATE
JUDGE'S FINDINGS AND
RECOMMENDATIONS**

Pro se petitioner Timothy C. Haithcox ("Haithcox") filed this amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on July 26, 2021. (Doc. 13). United States Magistrate Judge John Johnston determined Haithcox's amended petition presented procedurally defaulted claims. (Doc. 17) Judge Johnston ordered Haithcox to show cause why his petition should not be dismissed with prejudice. (*Id.*). Haithcox timely responded. (Doc. 19). Judge Johnston issued Findings and Recommendations on February 7, 2022. (Doc. 28). Judge Johnston's Findings and Recommendations addressed Haithcox's subsequent motions for entry of default (Doc. 25) and motion for contempt (Doc. 27) as well as the amended petition. (Doc. 28).

Judge Johnston denied Haithcox's motion for entry of default and motion for contempt. (Doc. 28 at 8). Judge Johnston recommended that the Court dismiss Haithcox's amended petition with prejudice and deny a certificate of appealability. (*Id.*). Haithcox filed objections to Judge Johnston's Findings and Recommendations. (Doc. 29).

The Court reviews de novo those Findings and Recommendations to which a party timely objected. 28 U.S.C. § 636(b)(1). The Court reviews for clear error the portions of the Findings and Recommendations to which the party did not specifically object. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). Where a party's objections constitute perfunctory responses argued in an attempt to engage the district court in a reargument of the same arguments set forth in the original response, however, the Court will review the applicable portions of the findings and recommendations for clear error. *Rosling v. Kirkegard*, 2014 WL 693315, *3 (D. Mont. Feb. 21, 2014) (internal citations omitted).

Haithcox objects to Judge Johnston's determination that Haithcox was not entitled to indictment by a grand jury. (Doc. 29 at 4). Haithcox asserts that he is entitled to indictment by a grand jury under the common law. *Id.* Haithcox's objection seems to arise from a fundamental misunderstanding of federalism and

the role of the common law in the American court system. A legislature may enact statutes that alter the common law, so long as the statutes adhere to constitutional due process. *Hurtado v. California*, 110 U.S. 516, 532–33 (1884). The U.S. Supreme Court determined in *Hurtado* that due process of law does not require an indictment by a grand jury as a prerequisite to prosecution, nor did the Fourteenth Amendment incorporate the Fifth Amendment right to a grand jury to the states. *Id.* at 535.

Haithcox asserts without support that *Hurtado* is no longer good law. (Doc. 29 at 4). This misapprehension seems to arise from Haithcox’s incorrect reading of *Powell v. Alabama*, 287 U.S. 45 (1932). (Doc. 29 at 5). Contrary to Haithcox’s assertion, *Powell* does not overrule *Hurtado*, but rather distinguishes the right to a grand jury from other rights that are incorporated by the Fourteenth Amendment. *Powell*, 287 U.S. at 67 (“These later cases establish that notwithstanding the sweeping character of the language in the *Hurtado* Case, the rule laid down is not without *exceptions*.”) (emphasis added).

Haithcox also argues that the State may only charge misdemeanors by information, citing to *State v. Ah Jim*, 23 P. 76. (Doc. 29 at 14). Haithcox once again fails to comprehend the case law to which he cites. The Montana Supreme Court determined in *Ah Jim* that the State *could* charge any crime by information,

but only after enacting a statute authorizing such a system. *Ah Jim*, 23 P. at 78 (1890). Montana has constitutionally enacted a statute to authorize charging any crime by information. *See* Mont. Code Ann. § 46-11-401. Haithcox's objection lacks merit.

Haithcox's objections otherwise advance the same arguments that he set forth previously. The Court reviewed Judge Johnston's Findings and Recommendations for clear error. *See Rosling*, 2014 WL 693315 at *3. The Court finds no error.

Accordingly, **IT IS ORDERED** that:

1. Judge Johnston's Findings and Recommendations (Doc. 29) are **ADOPTED IN FULL**.
2. Haithcox's Amended Petition (Doc. 13) is **DISMISSED** with prejudice as procedurally defaulted.
3. The Clerk of Court shall enter judgment, by separate document, in favor of Respondents and against Petitioner.
4. A certificate of appealability is **DENIED**.

DATED this 10th day of March, 2022.



Brian Morris, Chief District Judge
United States District Court